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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 CLAUDE JERRY FLOOD,) Case No. EDCV 17-0862-JPR
12)
13 Plaintiff,)
14) MEMORANDUM DECISION AND ORDER
15 v.) REVERSING COMMISSIONER
16)
17 NANCY A. BERRYHILL, Acting)
18 Commissioner of Social)
19 Security,)
20)
21 Defendant.)
22)
23)
24)
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29 I. PROCEEDINGS

30 Plaintiff seeks review of the Commissioner's final decision
31 denying his application for supplemental security income benefits
32 ("SSI"). The parties consented to the jurisdiction of the
33 undersigned under 28 U.S.C. § 636(c). The matter is before the
34 Court on the parties' Joint Stipulation, filed February 27, 2018,
35 which the Court has taken under submission without oral argument.
36 For the reasons stated below, the Commissioner's decision is
37 reversed and this action is remanded for further proceedings.
38

1 **II. BACKGROUND**

2 Plaintiff was born in 1961. (Administrative Record ("AR")
3 20, 33, 197.) He completed 11th grade (AR 50, 201, 207) and
4 worked as a pool-service man and groundskeeper (AR 19, 201, 207).

5 On June 18, 2013, Plaintiff applied for SSI, alleging that
6 he had been unable to work since December 30, 2008, because of
7 nerve damage in his right shoulder, carpal-tunnel syndrome, and
8 complications from an injury to his right elbow and subsequent
9 surgery. (AR 170.) His applications were denied initially and
10 on reconsideration (see AR 73-84, 86-96), and he requested a
11 hearing before an Administrative Law Judge (AR 117). A hearing
12 was held on August 12, 2015, at which Plaintiff, who was
13 represented by counsel, testified, as did a vocational expert.
14 (AR 30-72.) In a written decision issued December 11, 2015, the
15 ALJ found Plaintiff not disabled. (AR 12-21.) Plaintiff sought
16 Appeals Council review (AR 8), which was denied on March 14, 2017
17 (AR 1-6). This action followed.

18 **III. STANDARD OF REVIEW**

19 Under 42 U.S.C. § 405(g), a district court may review the
20 Commissioner's decision to deny benefits. The ALJ's findings and
21 decision should be upheld if they are free of legal error and
22 supported by substantial evidence based on the record as a whole.
23 See Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra v.
24 Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence
25 means such evidence as a reasonable person might accept as
26 adequate to support a conclusion. Richardson, 402 U.S. at 401;
27 Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It
28 is more than a scintilla but less than a preponderance.

1 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.
2 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether
3 substantial evidence supports a finding, the reviewing court
4 "must review the administrative record as a whole, weighing both
5 the evidence that supports and the evidence that detracts from
6 the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,
7 720 (9th Cir. 1998). "If the evidence can reasonably support
8 either affirming or reversing," the reviewing court "may not
9 substitute its judgment" for the Commissioner's. Id. at 720-21.

10 **IV. THE EVALUATION OF DISABILITY**

11 People are "disabled" for purposes of receiving Social
12 Security benefits if they are unable to engage in any substantial
13 gainful activity owing to a physical or mental impairment that is
14 expected to result in death or has lasted, or is expected to
15 last, for a continuous period of at least 12 months. 42 U.S.C.
16 § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir.
17 1992).

18 **A. The Five-Step Evaluation Process**

19 The ALJ follows a five-step evaluation process to assess
20 whether a claimant is disabled. 20 C.F.R. § 416.920(a)(4);
21 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995) (as
22 amended Apr. 9, 1996). In the first step, the Commissioner must
23 determine whether the claimant is currently engaged in
24 substantial gainful activity; if so, the claimant is not disabled
25 and the claim must be denied. § 416.920(a)(4)(i).

26 If the claimant is not engaged in substantial gainful
27 activity, the second step requires the Commissioner to determine
28 whether the claimant has a "severe" impairment or combination of

1 impairments significantly limiting his ability to do basic work
2 activities; if not, the claimant is not disabled and his claim
3 must be denied. § 416.920(a)(4)(ii).

4 If the claimant has a "severe" impairment or combination of
5 impairments, the third step requires the Commissioner to
6 determine whether the impairment or combination of impairments
7 meets or equals an impairment in the Listing of Impairments set
8 forth at 20 C.F.R. part 404, subpart P, appendix 1; if so,
9 disability is conclusively presumed. § 416.920(a)(4)(iii).

10 If the claimant's impairment or combination of impairments
11 does not meet or equal an impairment in the Listing, the fourth
12 step requires the Commissioner to determine whether the claimant
13 has sufficient residual functional capacity ("RFC")¹ to perform
14 his past work; if so, he is not disabled and the claim must be
15 denied. § 416.920(a)(4)(iv). The claimant has the burden of
16 proving he is unable to perform past relevant work. Drouin, 966
17 F.2d at 1257. If the claimant meets that burden, a prima facie
18 case of disability is established. Id. If that happens or if
19 the claimant has no past relevant work, the Commissioner then
20 bears the burden of establishing that the claimant is not
21 disabled because he can perform other substantial gainful work
22 available in the national economy. § 416.920(a)(4)(v); Drouin,
23 966 F.2d at 1257. That determination comprises the fifth and
24 final step in the sequential analysis. § 416.920(a)(4)(v);

25
26 ¹ RFC is what a claimant can do despite existing
27 exertional and nonexertional limitations. § 416.945; see Cooper
28 v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). The
Commissioner assesses the claimant's RFC between steps three and
four. Laborin v. Berryhill, 867 F.3d 1151, 1153 (9th Cir. 2017)
(citing § 416.920(a)(4)).

1 Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d at 1257.

2 B. The ALJ's Application of the Five-Step Process

3 At step one, the ALJ found that Plaintiff had not engaged in
4 substantial gainful activity since June 18, 2013, the application
5 date. (AR 14.) At step two, she concluded that Plaintiff had
6 severe impairments of "degenerative disc disease of the cervical
7 spine and lumbar spine; right shoulder and right elbow disorder;
8 and carpal tunnel syndrome of the bilateral wrists." (Id.) At
9 step three, she determined that Plaintiff's impairments did not
10 meet or equal a listing. (AR 15.) At step four, the ALJ found
11 that Plaintiff had the RFC to perform a limited range of medium
12 work:

13 [Plaintiff] can lift and carry 50 pounds occasionally and
14 25 pounds frequently; sit, stand, and walk for six hours
15 out of an eight-hour workday. He is limited to frequent
16 use of right hand controls for pushing and pulling and
17 frequent bilateral handling and fingering. He can
18 frequently climb stairs and ramps, balance, stoop, kneel,
19 crouch and crawl; and occasionally climb ladders, ropes,
20 or scaffolds. He can have occasional exposure to
21 unprotected heights, moving mechanical parts, extreme
22 cold, and vibrations.

23 (Id.) Based in part on the VE's testimony, the ALJ concluded
24 that Plaintiff was able to perform his past relevant work as a
25 groundskeeper and swimming-pool servicer "as generally performed
26 in the regional and national economy, but not as actually
27 performed by [him]." (AR 19.) Alternatively, at step five, the
28 ALJ found that given Plaintiff's age, education, work experience,

1 and RFC, he could perform three "representative" jobs in the
2 national economy. (AR 20-21.) Thus, the ALJ found Plaintiff not
3 disabled. (AR 21.)

4 **V. DISCUSSION²**

5 A. The ALJ Did Not Properly Consider the Medical Evidence 6 in Determining Plaintiff's RFC

7 Plaintiff contends that the ALJ erred in assessing the
8 medical evidence. (J. Stip. at 4-9.) He argues that the ALJ
9 relied too heavily on the findings of consulting orthopedist
10 Vicente Bernabe, and those findings were "not consistent with or
11 supported by the totality of evidence." (Id. at 5.) He further
12 argues that the ALJ improperly failed to consider evidence from
13 Dr. Khalid Ahmed, who treated him for several years, and Dr.
14 Michael Tomkins, who examined him twice in the months leading up
15 to the hearing. (Id. at 6-8.) As discussed below, remand is
16 warranted based on the ALJ's failure to discuss evidence from Dr.
17 Ahmed.

18 1. Applicable law

19 A claimant's RFC is "the most [he] can still do" despite the
20 impairments and related symptoms that "may cause physical and
21 mental limitations that affect what [he] can do in a work
22 setting." § 416.945(a)(1). A district court must uphold an
23

24 ² In Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018), the
25 Supreme Court recently held that ALJs of the Securities and
26 Exchange Commission are "Officers of the United States" and thus
27 subject to the Appointments Clause. To the extent Lucia applies
28 to Social Security ALJs, Plaintiff has forfeited the issue by
failing to raise it during his administrative proceedings. (See
AR 8, 32-63; J. Stip. at 4-9, 19-22); Meanel v. Apfel, 172 F.3d
1111, 1115 (9th Cir. 1999) (as amended) (plaintiff forfeits
issues not raised before ALJ or Appeals Council).

1 ALJ's RFC assessment when the ALJ has applied the proper legal
2 standard and substantial evidence in the record as a whole
3 supports the decision. Bayliss v. Barnhart, 427 F.3d 1211, 1217
4 (9th Cir. 2005). The ALJ must consider all the medical opinions
5 "together with the rest of the relevant evidence."
6 § 416.927(b);³ see also § 416.945(a)(1) ("We will assess your
7 residual functional capacity based on all the relevant evidence
8 in your case record.").

9 Three types of physicians may offer opinions in Social
10 Security cases: (1) those who directly treated the plaintiff, (2)
11 those who examined but did not treat the plaintiff, and (3) those
12 who did neither. Lester, 81 F.3d at 830. A treating physician's
13 opinion is generally entitled to more weight than an examining
14 physician's, and an examining physician's opinion is generally
15 entitled to more weight than a nonexamining physician's. Id.;
16 see § 416.927(c)(1).

17 This is so because treating physicians are employed to cure
18 and have a greater opportunity to know and observe the claimant.
19

20 ³ Social Security regulations regarding the evaluation of
21 opinion evidence were amended effective March 27, 2017. When, as
22 here, the ALJ's decision is the final decision of the
23 Commissioner, the reviewing court generally applies the law in
24 effect at the time of the ALJ's decision. See Lowry v. Astrue,
25 474 F. App'x 801, 804 n.2 (2d Cir. 2012) (applying version of
26 regulation in effect at time of ALJ's decision despite subsequent
27 amendment); Garrett ex rel. Moore v. Barnhart, 366 F.3d 643, 647
28 (8th Cir. 2004) ("We apply the rules that were in effect at the
time the Commissioner's decision became final."); Spencer v.
Colvin, No. 3:15-CV-05925-DWC, 2016 WL 7046848, at *9 n.4 (W.D.
Wash. Dec. 1, 2016) ("42 U.S.C. § 405 does not contain any
express authorization from Congress allowing the Commissioner to
engage in retroactive rulemaking"). Accordingly, citations to 20
C.F.R. § 416.927 are to the version in effect from August 24,
2012, to March 26, 2017.

1 Smolen v. Chater, 80 F.3d 1273, 1285 (9th Cir. 1996). But "the
2 findings of a nontreating, nonexamining physician can amount to
3 substantial evidence, so long as other evidence in the record
4 supports those findings." Saelee v. Chater, 94 F.3d 520, 522
5 (9th Cir. 1996) (per curiam) (as amended).

6 The ALJ may reject a treating physician's opinion whether or
7 not that opinion is contradicted. Magallanes v. Bowen, 881 F.2d
8 747, 751 (9th Cir. 1989) ("For example, the ALJ need not accept a
9 treating physician's opinion which is 'brief and conclusionary in
10 form with little in the way of clinical findings to support [its]
11 conclusion.'" (citation omitted) (alteration in original)). When
12 a treating physician's opinion is not contradicted by other
13 medical-opinion evidence, however, it may be rejected only for a
14 "clear and convincing" reason. Id.; see Carmickle v. Comm'r,
15 Soc. Sec. Admin., 533 F.3d 1155, 1164 (9th Cir. 2008) (citing
16 Lester, 81 F.3d at 830-31). When it is contradicted, the ALJ
17 must provide only a "specific and legitimate reason[]" for
18 discounting it. Carmickle, 533 F.3d at 1164 (citing Lester, 81
19 F.3d at 830-31).

20 An ALJ may not disregard a treating physician's opinion
21 unless she sets forth "specific, legitimate reasons for doing so
22 that are based on substantial evidence in the record." Smolen,
23 80 F.3d at 1285 (citation omitted). "[A]n ALJ errs when [she]
24 rejects a medical opinion" by "doing nothing more than ignoring
25 it." Garrison v. Colvin, 759 F.3d 995, 1012-13 (9th Cir. 2014)
26 (citing Nguyen v. Chater, 100 F.3d 1462, 1464 (9th Cir. 1996)).

27 The Court must consider the ALJ's decision in the context of
28 "the entire record as a whole," and if the "evidence is

1 susceptible to more than one rational interpretation,' the ALJ's
2 decision should be upheld." Ryan v. Comm'r of Soc. Sec., 528
3 F.3d 1194, 1198 (9th Cir. 2008) (citation omitted).

4 2. Relevant background

5 i. *Medical examinations and treatment*

6 Plaintiff began seeing orthopedist Khalid Ahmed in January
7 2009 in connection with a workers'-compensation claim.⁴ (AR
8 293.) He complained of "[r]ight elbow pain" and "[r]ight hand
9 pain with radiating pain going up the right elbow to the right
10 forearm to the right shoulder," resulting from "continuous
11 trauma" from approximately August 8, 2007, to November 5, 2008,
12 caused by his job duties as a maintenance man. (Id.) Dr. Ahmed
13 observed that Plaintiff had "decreased lordosis" of the cervical
14 spine, with a slightly reduced range of motion on his left side,
15 and "evidence of tightness and spasm" at the right and left
16 "trapezius, sternocleidomastoid, and strap muscles." (AR 296.)
17 He noted a decreased range of motion in Plaintiff's right
18 shoulder, "with step-off noted over right AC joints,"
19 "[e]xostosis and pain on pressure," "atrophy of right deltoid and
20

21 ⁴ Plaintiff injured his right elbow on the job on August
22 8, 2007, while using a pickaxe but returned to his normal duties
23 a few days later. (AR 294, 378.) He claims that the condition
24 of his right arm worsened until he reinjured it on November 5,
25 2008, while "shoveling and pulling a backhoe." (AR 378.) He was
fired, apparently sometime in December 2008, following theft
allegations. (AR 38-39, 201.)

26 At Plaintiff's first visit with Dr. Ahmed, he reported that
27 he had been seen at San Bernardino Hospital in November 2008 for
injuries to his right shoulder and arm and was given pain
medication and cortisone shots. (AR 294; see also AR 371-72.)
28 The record does not contain any examination notes or reports from
before January 9, 2009, however.

1 rotator cuff muscles," and a positive impingement test. (AR
2 297.) His wrists and hands had normal extension and flexion, but
3 his right wrist showed positive Tinel's and Phalen's signs.⁵ (AR
4 298.) His thoracic and lumbar spines were assessed as normal.
5 (AR 298-99.) Dr. Ahmed diagnosed him with "Chronic Pain Syndrome
6 Secondary to Lateral Epicondylitis, Right Elbow with Failed
7 Cortisone Injections x1," and "Right Shoulder Tendinitis
8 Impingement Syndrome with AC Joint Arthritis." (AR 302.) He
9 placed him on temporary total disability for six weeks and noted
10 that Plaintiff's injuries would restrict him to lifting no more
11 than 10 to 15 pounds with his right arm, no forceful pulling or
12 squeezing with his right "upper extremity," and no overhead work
13 with his right arm. (AR 302-03.) Dr. Ahmed prescribed Anaprox,⁶

22
23 ⁵ Tinel's sign is positive when tapping the front of the
24 wrist produces tingling of the hand. See Carpal Tunnel Syndrome,
25 Medicine Net, [https://www.medicinenet.com/carpal_tunnel_syndrome/](https://www.medicinenet.com/carpal_tunnel_syndrome/article.htm)
26 [article.htm](https://www.medicinenet.com/carpal_tunnel_syndrome/article.htm) (last visited Sept. 25, 2018). Phalen's sign is
positive when bending the wrist downward produces tingling of the
hand. See id. Both are considered markers of carpal-tunnel
syndrome. See id.

27 ⁶ Anaprox is a brand name for naproxen sodium and is a
28 nonsteroidal anti-inflammatory drug used to treat pain and
swelling. See Anaprox, WebMD, [https://www.webmd.com/drugs/2/](https://www.webmd.com/drugs/2/drug-10989/anaprox-oral/details)
[drug-10989/anaprox-oral/details](https://www.webmd.com/drugs/2/drug-10989/anaprox-oral/details) (last visited Sept. 25, 2018).

1 Prilosec,⁷ Norco,⁸ baclofen,⁹ Paxil,¹⁰ and Tranxene¹¹ and
2 recommended physiotherapy and an MRI. (AR 303.)

3 At a follow-up visit with Dr. Ahmed on February 20, 2009,
4 Plaintiff still complained of pain in his right elbow and
5 shoulder as well as numbness in those areas. (AR 290.) Dr.
6 Ahmed noted that the numbness "very well may be coming from the
7 cervical spine" and recommended further diagnostic studies and
8 physiotherapy. (AR 290.)

9 Plaintiff continued to see Dr. Ahmed regularly for right-
10 elbow and shoulder pain and was also diagnosed with disc
11 protrusion of the cervical spine with radiculitis. (See, e.g.,
12 _____

13 ⁷ Prilosec is a brand name for omeprazole and is used to
14 treat stomach and esophagus problems, such as acid reflux,
15 ulcers, heartburn, and difficulty swallowing. See Prilosec,
16 WebMD, [https://www.webmd.com/drugs/2/drug-7957-1173/
prilosec-oral/omeprazole-delayed-release-suspension-oral/details](https://www.webmd.com/drugs/2/drug-7957-1173/prilosec-oral/omeprazole-delayed-release-suspension-oral/details)
(last visited Sept. 26, 2018).

17 ⁸ Norco is a brand-name combination of the opioid pain
18 reliever hydrocodone and the nonopioid pain reliever
19 acetaminophen, and it works in the brain to change how the body
20 feels and responds to pain. See Norco, WebMD, [https://
www.webmd.com/drugs/2/drug-63/norco-oral/details](https://www.webmd.com/drugs/2/drug-63/norco-oral/details) (last visited
21 Sept. 26, 2018).

22 ⁹ Baclofen is a muscle relaxant used to treat muscle
23 spasms caused by multiple sclerosis or spinal-cord injury or
24 disease. See Baclofen, WebMD, [https://www.webmd.com/drugs/
2/drug-8615/baclofen-oral/details](https://www.webmd.com/drugs/2/drug-8615/baclofen-oral/details) (last visited Sept. 26, 2018).

25 ¹⁰ Paxil is a brand name for paroxetine and is a selective
26 serotonin reuptake inhibitor used to treat anxiety and
27 depression. See Paxil, WebMD, [https://www.webmd.com/drugs/2/
drug-6968-9095/paxil-oral/paroxetine-oral/details](https://www.webmd.com/drugs/2/drug-6968-9095/paxil-oral/paroxetine-oral/details) (last visited
28 Sept. 26, 2018).

¹¹ Tranxene is a brand name for clorazepate dipotassium, a
benzodiazepine used to treat anxiety, acute alcohol withdrawal,
and seizures. See Tranxene, WebMD, [https://www.webmd.com/drugs/
2/drug-14016/tranxene-t-tab-oral/details](https://www.webmd.com/drugs/2/drug-14016/tranxene-t-tab-oral/details) (last visited Sept. 26,
2018).

1 AR 260-64, 265-69, 273-77.) In June 2009 Dr. Ahmed recommended
2 and Plaintiff agreed to right lateral epicondylar release surgery
3 because treatment with pain medication, cortisone injections, and
4 physical therapy had not been effective. (AR 274.) Plaintiff
5 had surgery in July 2009. (AR 373.)

6 On September 25, 2009, Plaintiff again saw Dr. Ahmed, who
7 observed that he had "mildly decreased" abduction, forward
8 flexion, and internal rotation in his right shoulder and
9 discomfort in his left arm. (AR 266.) He diagnosed
10 "compensatory pain, [l]eft [e]lbow," and recommended pain
11 medication and physical therapy for both elbows. (Id.) At a
12 follow-up visit on November 17, 2009, Dr. Ahmed observed "pain on
13 extension" of Plaintiff's lumbar spine, a positive straight-leg-
14 raise test,¹² a positive axial-loaded compression test¹³ of
15 Plaintiff's cervical spine, and "diminished and painful"
16 mobility. (AR 261.)

17 Plaintiff's condition evidently did not improve, and he
18 continued seeing Dr. Ahmed regularly. On April 29, 2010,
19 Plaintiff had an MRI of his cervical spine, which showed
20 posterior disc protrusions at the C3-C4 and C5-C6 levels but no
21

22 ¹² A straight-leg-raise test checks the mechanical
23 movement of neurological tissues and their sensitivity to stress
24 and compression when disc herniation is suspected. See Straight
25 Leg Raise Test, Physiopedia, https://www.physio-pedia.com/Straight_Leg_Raise_Test (last visited Sept. 26, 2018). Pain when
the leg is raised to between 30 and 70 degrees "is suggestive of
lumbar disc herniation." Id.

26 ¹³ An axial-compression test checks for shoulder or spinal
27 pain when pressure is placed on the patient's head; one version
of it is known as "Spurling's Test." See Spurling's Test,
28 Physiopedia, https://www.physio-pedia.com/Spurling%27s_Test (last
visited Sept. 26, 2018).

1 evidence of spinal stenosis. (AR 475-76.) On May 26, 2010,
2 Plaintiff underwent a neurological examination and
3 electrodiagnostic study by Dr. Mumtaz A. Ali, after a referral
4 from Dr. Ahmed. (AR 465-72.) Dr. Ali observed that Plaintiff's
5 "[s]ensation to fine touch and pinprick was decreased in the
6 right 4th and 5th digits" (AR 468), and lab tests showed
7 decreased motor-conduction velocity in his right ulnar motor
8 nerve and decreased amplitude in his right ulnar sensory nerve
9 but no evidence of cervical radiculopathy or denervation (AR
10 471). He concluded that "[Plaintiff's] subjective complaints are
11 consistent with the history of injury." (AR 469.)

12 On July 23, 2010, in response to Dr. Ali's report and
13 Plaintiff's continuing complaints of pain, Dr. Ahmed requested an
14 authorization for surgery. (AR 459-63.) The record does not
15 disclose what type of surgery was contemplated. (See id.) Dr.
16 Ahmed made another authorization request on September 10, 2010,
17 recommending "cubital tunnel release of the right elbow." (AR
18 453-54, 457.) Plaintiff underwent that surgery on October 30,
19 2010. (AR 443.) He continued to see Dr. Ahmed regularly
20 thereafter for pain in both of his arms and his neck. (See,
21 e.g., AR 419-29.)

22 On May 2, 2011, agreed medical examiner Dr. David Wood¹⁴
23 apparently examined Plaintiff in connection with his workers'-
24 compensation claim and found him to have "loss of sensation from
25 the ulnar nerve arising from the right elbow," with "ongoing

26
27 ¹⁴ Dr. Wood appears to have been an orthopedist, although
28 the AR does not expressly state as much. (See, e.g., AR 335
(Plaintiff seen for "orthopedic" reexam; report typed on
stationery from University Spine & Orthotics).)

1 related pain" and "loss of muscle power." (AR 332-33.)¹⁵ Dr.
2 Wood observed that Plaintiff had difficulty with daily activities
3 like "opening car doors, getting in and out of a car, and taking
4 a bath." (AR 333.) He gave Plaintiff an eight percent upper-
5 extremity impairment and a five percent whole-person impairment¹⁶
6 based on the carpal-tunnel syndrome and a two percent upper-
7 extremity impairment and one percent whole-person impairment
8 based on his "cervical spine condition." (Id.) He also
9 evidently opined that Plaintiff "is not a candidate for surgery
10 to [his] cervical spine nor do I think that he needs to have any
11 type of surgery to the right wrist, shoulder, or left wrist" on

12
13 ¹⁵ Dr. Wood's original examination notes from May 2, 2011,
14 are not part of the AR.

15 ¹⁶ "Whole Person Impairment" is a term of art in workers'
16 compensation that refers to "[p]ercentages that estimate the
17 impact on the individual's overall ability to perform activities
18 of daily living, excluding work." Milpitas Unified Sch. Dist. v.
19 Workers' Comp. Appeals Bd., 187 Cal. App. 4th 808, 814 n.5 (Ct.
20 App. 2010) (as modified) (alteration in original) (citing Am.
21 Med. Ass'n, Guides to the Evaluation of Permanent Impairment at
22 603 (5th ed. 2000)). A WPI of less than 100 percent "entitles
23 the injured worker to a prescribed number of weeks of indemnity
24 payments in accordance with that percentage" to compensate for
25 the loss of "some or all of [his] future earning capacity." Id.
26 at 819 (citation omitted).

27 Findings of disability for purposes of workers' compensation
28 or other programs or agencies are not binding in Social Security
cases, see Lee v. Comm'r of Soc. Sec., No. 2:16-cv-02565-CKD,
2018 WL 684799, at *5-6 (E.D. Cal. Feb. 1, 2018) (citation
omitted) (WPI of 19 percent based on injury to plaintiff's right
"upper extremity" not entitled to particular weight in
application for SSI and DIB; affirming Commissioner's finding
that plaintiff was not disabled), but may be considered as
evidence of possible impairment, see Meza v. Colvin, No. CV 15-
7291-SP, 2016 WL 7479321, at *4-7 (C.D. Cal. Dec. 29, 2016)
(remanding in part because ALJ failed to consider opinion of
treating psychiatrist who assessed plaintiff with nine- to 12-
percent WPI and various functional limitations); see also
§ 416.904.

1 an "acute basis," but surgery "should be held open to him in the
2 future possibly" if his condition worsened. (AR 415.) On July
3 1, 2011, Dr. Ahmed reported that Plaintiff was "quite frustrated"
4 because "he was apparently waiting for surgical intervention in
5 terms of his carpal tunnel, but he says just the first cut is
6 funding," apparently referring to a lack of insurance coverage
7 for left-wrist or shoulder surgery. (AR 420.)

8 Plaintiff was examined by Dr. Ahmed again on August 12,
9 2011. (AR 413-18.) Dr. Ahmed observed positive Tinel's and
10 Phalen's signs on both hands and a positive axial-loading
11 compression test on his cervical spine, and he noted that
12 "[m]obility is diminished and painful." (AR 414.) Dr. Ahmed saw
13 Plaintiff again in January and April 2012 to refill his
14 prescriptions for Norco and Prilosec, and he also prescribed two
15 topical treatments for pain relief. (AR 403-12.) He noted both
16 times that Plaintiff's mobility was still diminished and painful
17 and that he had a positive axial-compression test. (AR 404,
18 409.)

19 On March 11, 2013, Plaintiff was reexamined by Dr. Wood.
20 (AR 335-41.) He complained of "constant, aching pain in the neck
21 with locking when turning the head to the right," "constant,
22 aching pain and at times popping in the right shoulder," "off and
23 on, sore type pain in the right elbow," and "ongoing numbness
24 into the last three fingers of the right hand." (AR 335.) He
25 indicated that his symptoms worsened when holding or gripping
26 things with his right hand, stretching out his right arm, turning
27 his neck, or driving, among other things. (AR 335-36.) He also
28 complained of pain and numbness in his left wrist that "increases

1 with lifting trash bags." (AR 336.) He rated his elbow pain at
2 four of 10 and his other pains at six or seven of 10. (AR 335-
3 36.) Dr. Wood found him to have normal ranges of motion in his
4 cervical spine, shoulders, and wrists, but he noted reduced grip
5 strength in his right hand and positive Tinel's and "Mill's"¹⁷
6 tests on his right side. (AR 337-39.) X-rays showed "spurring
7 off of [the] C5 and C6 [vertebrae]" and mild shoulder arthritis
8 with acromial spurring. (AR 339.) Dr. Wood concluded that
9 Plaintiff "d[id] not appear significantly changed" from his
10 evaluation in 2011, when he had rated him in his workers'-
11 compensation case as "temporarily totally disabled" for the
12 period at issue. (AR 340; see also AR 333.)¹⁸

13 On June 28, 2013, shortly after he applied for SSI benefits,
14 Plaintiff again visited Dr. Ahmed, complaining of neck pain. (AR
15 399.) Dr. Ahmed diagnosed him with "Cervical Sprain/Strain, Disk
16 Lesion with Radiculitis/Radiculopathy with Evidence of Herniated
17 Nucleus Pulposus with Positive MRI Scan," "Tendonitis,
18 Impingement Syndrome, Right Shoulder with Positive MRI Scan,"
19 residual loss of strength in his right elbow resulting from
20 surgery, and "Tendonitis, Carpal Tunnel Syndrome, Right Wrist and
21

22 ¹⁷ A Mill's test is used to diagnose lateral
23 epicondylitis, or "tennis elbow." See Mill's Test, Physiopedia,
24 https://www.physio-pedia.com/Mill%E2%80%99s_Test (last visited
25 Sept. 25, 2018). The clinician holds the affected elbow with one
26 hand and extends and flexes the patient's forearm and wrist; if
the patient experiences pain, the test is positive. Id.

27 ¹⁸ Plaintiff was ultimately rated "permanent and
stationary" at seven percent WPI for state- and local-benefits
28 purposes. (AR 366.) The designation occurred on October 25,
2013, and took into account gastrointestinal "injury" Plaintiff
incurred as a side effect of his pain medications. (Id.)

1 Hand with Positive NCV Test," among other things. (Id.) Dr.
2 Ahmed prescribed Norco and Ultram¹⁹ for pain and Prilosec for
3 "gastric mucosa." (Id.) Plaintiff indicated that those
4 medications had been helpful in the past. (AR 400.)

5 On October 9, 2013, Plaintiff saw Dr. Ahmed for a follow-up
6 visit, complaining of neck pain. (AR 355-58.) Dr. Ahmed found
7 him to have tightness in the muscles surrounding his cervical
8 spine and a cervical-spine rotational range of motion of only 65
9 degrees.²⁰ (AR 356.) He repeated his previous diagnoses and
10 renewed Plaintiff's prescriptions for Norco, Ultram, and Anaprox.
11 (Id.)

12 Five days later, on October 14, 2013, Plaintiff was examined
13 by consulting orthopedist Bernabe. (AR 346-51.) The doctor
14 reviewed "a medical progress note dated 3/11/13"²¹ but evidently
15 none of Plaintiff's other medical records. (AR 346.) Dr.
16 Bernabe reported that Plaintiff had had "x-rays of the neck"
17 showing degenerative osteoarthritis, but he was apparently
18 unaware of Plaintiff's MRI results or the electrodiagnostic study
19 that confirmed nerve damage to his right hand and arm. According
20 to his report, Plaintiff complained only of right-elbow and neck
21 pain and "denie[d] any numbness or tingling to his right upper
22 extremity." (AR 347.) Dr. Bernabe's report does not mention

23
24 ¹⁹ Ultram is a brand name for tramadol, an opioid pain
25 reliever. See Ultram, WebMD, <https://www.webmd.com/drugs/2/drug-11276/ultram-oral/details> (last visited Sept. 26, 2018).

26 ²⁰ Dr. Wood's March 11, 2013 report lists 80 degrees
27 bilaterally as the "normal" range of motion for rotation of the
cervical spine. (See AR 337.)

28 ²¹ This presumably refers to some or all of Dr. Wood's
report (AR 335-41), but Bernabe's notes do not expressly say so.

1 Plaintiff's history of carpal-tunnel syndrome in both wrists or
2 any problem with his left hand or wrist. (See AR 346-51.)

3 Dr. Bernabe observed that Plaintiff had a normal range of
4 motion in his neck, arms, wrists, and shoulders, could ambulate
5 normally, and could get on and off the examination table without
6 difficulty. (AR 348-49.) Plaintiff's right-hand grip strength
7 was noticeably weaker than his left, but Dr. Bernabe assessed his
8 motor strength as "grossly within normal limits" and opined that
9 he had "normal" sensation in his upper extremities. (AR 349.)
10 He further opined that Plaintiff could work with "no manipulative
11 restrictions." (AR 350.)

12 On January 10, 2014, Plaintiff returned to Dr. Ahmed's
13 office, complaining of pain in his left wrist. (AR 393-94.) Dr.
14 Ahmed noted swelling in Plaintiff's left wrist and observed that
15 "[e]xtension is 45 degrees, flexion is 45 degrees, radial
16 deviation is 20 degrees, and ulnar deviation is 30 degrees." (AR
17 394.) He reported relevant diagnoses of "Bilateral Carpal Tunnel
18 Syndrome" and "Chronic Pain Syndrome" secondary to epicondylitis
19 of the right elbow, right-shoulder impingement, disc lesion of
20 the cervical spine, complications from surgery, and compensatory
21 pain of the left elbow. (AR 394-95.) Dr. Ahmed "agree[d]" with
22 another doctor's assessment of seven percent WPI. (Id.)

23 On December 22, 2014, Plaintiff was examined by Dr. Miguel
24 Martinez²² at Arrowhead Regional Medical Center, complaining of
25 chronic right-hip pain that became worse with activity. (AR 560-
26 63.) Dr. Martinez observed "swelling" and "warmth" in

27
28 ²² The AR does not indicate Dr. Martinez's medical
specialty.

1 Plaintiff's right hip (AR 563) and noted a positive straight-leg-
2 raise test in his right leg at a 30-degree angle (AR 562). He
3 diagnosed him with "ongoing right leg radiculopathy" and chronic
4 right-hip pain, prescribed ibuprofen and Tylenol, and ordered
5 another MRI of Plaintiff's spine. (AR 561-62.)

6 On February 3, 2015, Dr. Michael Tomkins²³ examined
7 Plaintiff, apparently as a follow-up to the visit with Dr.
8 Martinez. (AR 557-59.) Plaintiff complained of arm pain as well
9 as "chronic neck and low back pain" that "radiates into his right
10 leg/hip" and "is worse with lying and sitting." (AR 557.) He
11 rated his pain at eight of 10. (Id.) Plaintiff apparently told
12 Dr. Tomkins that "he was recommended for surgery in the past and
13 would like to see an [o]rthopedic [s]urgeon" about his lower-back
14 pain. (Id.) It is not clear whether Plaintiff was referring to
15 Dr. Wood's 2011 recommendation that surgery be left open as a
16 future possibility (AR 415) or if he received a more specific
17 referral for surgery at some other time; no such referral is in
18 the record. Dr. Tomkins prescribed gabapentin,²⁴ naproxen,²⁵ and
19
20

21 ²³ Dr. Tomkins appears to have been a family practitioner.
22 (See, e.g., AR 557.)

23 ²⁴ Gabapentin, also sold under the brand name Neurontin, is
24 an anticonvulsant used to relieve nerve pain. See Gabapentin,
25 WebMD, <https://www.webmd.com/drugs/2/drug-14208-8217/gabapentin-oral/gabapentin-oral/details> (last visited Sept. 25, 2018).

26 ²⁵ Naproxyn, also sold under the brand name Naprosyn, is a
27 nonsteroidal anti-inflammatory that relieves pain from muscle
28 aches and reduces pain, swelling, and joint stiffness caused by
arthritis. See Naprosyn Tablet, WebMD, <https://www.webmd.com/drugs/2/drug-1705-1289/naprosyn-oral/naproxen-oral/details> (last visited Sept. 26, 2018).

1 diclofenac gel,²⁶ referred him to an orthopedist, and made a note
2 to check on the status of the planned MRI. (AR 559.)

3 On April 29, 2015, Plaintiff was seen for the second time by
4 Dr. Tomkins, who noted tenderness in the left neck paravertebral
5 musculature of Plaintiff's cervical spine and in the right
6 paravertebral musculature of Plaintiff's lumbar spine. (AR 551.)
7 He observed a positive straight-leg raise on the right side and
8 decreased range of motion in Plaintiff's left cervical-spine
9 rotation. (Id.) He renewed the prescriptions for naproxen and
10 gabapentin. (AR 552.)

11 On April 30, 2015, Plaintiff underwent an MRI of his lumbar
12 spine, which showed diffuse disc bulges at the L3-4 and L4-5
13 levels with facet hypertrophy, causing mild spinal and foraminal
14 stenosis.²⁷ (AR 536.) Plaintiff returned on May 29, 2015, to
15 discuss his MRI results with Dr. Tomkins (AR 548) and on July 14,
16 2015, to receive intramuscular injections of Toradol²⁸ and its

17
18 ²⁶ Diclofenac is a nonsteroidal anti-inflammatory drug that
19 reduces substances in the body that cause pain and inflammation.
20 See Diclofenac, Drugs.com, <https://www.drugs.com/diclofenac.html>
(last updated Mar. 23, 2017). It is used to treat mild to
moderate pain or signs and symptoms of osteoarthritis and
rheumatoid arthritis. Id.

21
22 ²⁷ Spinal stenosis is a narrowing of the spinal canal and
can cause pain, numbness, tingling, and difficulty standing or
walking. See What is Spinal Stenosis?, WebMD, [https://](https://www.webmd.com/back-pain/guide/spinal-stenosis#1)
23 www.webmd.com/back-pain/guide/spinal-stenosis#1 (last visited
24 Sept. 25, 2018). Foraminal stenosis is a narrowing of the
openings allowing nerves to branch from the spine to the rest of
25 the body and can cause similar symptoms. See Foraminal Stenosis,
Cedars-Sinai Med. Ctr., [https://www.cedars-sinai.edu/Patients/](https://www.cedars-sinai.edu/Patients/Health-Conditions/Foraminal-Stenosis.aspx)
26 [Health-Conditions/Foraminal-Stenosis.aspx](https://www.cedars-sinai.edu/Patients/Health-Conditions/Foraminal-Stenosis.aspx) (last visited Sept. 25,
2018).

27
28 ²⁸ Toradol is a brand name for ketorolac, an NSAID pain
reliever. See Toradol, WebMD, [https://www.webmd.com/drugs/2/](https://www.webmd.com/drugs/2/drug-57955/toradol-intramuscular/details)
[drug-57955/toradol-intramuscular/details](https://www.webmd.com/drugs/2/drug-57955/toradol-intramuscular/details) (last visited Sept. 25,

1 generic equivalent from an unnamed provider (AR 546-47).

2 On May 29, 2015, evidently at the appointment to discuss
3 Plaintiff's MRI results (AR 548-49), Dr. Tomkins completed a
4 "Physical Impairment Questionnaire" supplied by Plaintiff's
5 counsel. (AR 541-44.) After noting that he had had only two
6 visits with Plaintiff, he diagnosed him with "cervical spine disk
7 bulge" and "lumbar spine disk bulge" causing "neck pain with
8 radicular [symptoms]" and "lumbar spine pain w[ith] [r]ight leg
9 pain." (AR 542.) He indicated that Plaintiff's condition was
10 "not likely to improve, unless [he] undergoes surgery or other
11 treatments." (Id.) He also indicated that Plaintiff's symptoms
12 were "often," although not "frequently," "severe enough to
13 interfere with the attention [and] concentration required to
14 perform simple work-related tasks." (Id.)

15 Dr. Tomkins filled out the next section of the form with
16 "direct answers from [Plaintiff]," including limitations on
17 walking, sitting, standing, and working an eight-hour day without
18 unscheduled breaks; he opined, "based on [Plaintiff's] response,"
19 that Plaintiff was not "physically capable of working" a normal
20 40-hour weekly work schedule. (AR 543.)

21 Dr. Tomkins also indicated that Plaintiff could "never" lift
22 50 pounds, "occasionally" lift 20 pounds, and "frequently" lift
23 10 pounds or less. (Id.) He noted that Plaintiff had
24 "limitations in doing repetitive reaching, handling, or
25 fingering" but that he was "unable to assess" what percentage of
26 an eight-hour workday Plaintiff would be able to use his hands,

27
28 _____
2018).

1 fingers, or arms for specific activities. (Id.) He estimated,
2 "based on [his] experience with [Plaintiff] and based upon
3 objective medical, clinical, and laboratory findings," that
4 Plaintiff would be absent from work as a result of his conditions
5 three or four times a month. (Id.) He also indicated that
6 Plaintiff was not a malingerer, "at least w[ith] [his] limited
7 encounters." (Id.) He concluded by noting that he did not know
8 how long Plaintiff had had the assessed limitations and then
9 wrote, "1 year?" (AR 544.)

10 *ii. Reviewing opinions and evaluations*

11 On October 31, 2013, SSA medical consultant Dr. Leonard
12 Naiman²⁹ reviewed Plaintiff's medical files, including the
13 records from Dr. Ahmed, Dr. Wood, and Dr. Bernabe, which he
14 considered as "significant objective findings" (AR 77), in order
15 to assess Plaintiff's RFC (AR 74-84). He placed "great weight"
16 on Dr. Bernabe's report and "adjudicated [Plaintiff's
17 application] strongly on" it. (AR 79, 81.) He found that
18 Plaintiff could lift 50 pounds "occasionally" and 25 pounds
19 "frequently," stand or walk for about six hours of an eight-hour
20 workday, and "[f]requently" or "[o]ccasionally" climb, balance,
21 stoop, kneel, crouch, or crawl. (AR 79-80.) He assessed
22 manipulative limitations on left and right overhead reaching and
23 bilateral handling and feeling, and he recommended that Plaintiff
24 avoid "concentrated exposure" to cold, vibration, and hazards.
25 (AR 80-81.) Those findings supported an RFC for medium work with

26
27 ²⁹ The AR does not indicate Dr. Naiman's medical
28 specialty, but he appears to have been an internist. See Schmidt
v. Colvin, No. EDCV 13-1331-JPR, 2014 WL 4237124, at *4 & n.8
(C.D. Cal. Aug. 26, 2014).

1 some limitations and a finding that Plaintiff was not disabled.
2 (AR 83.) Although Dr. Naiman reported relying heavily on Dr.
3 Bernabe's examination notes, he put in manipulative limitations,
4 such as those for bilateral fingering and reaching, that were not
5 in Dr. Bernabe's report; he did not cite any medical document or
6 opinion in particular on which he based those limitations. He
7 found Plaintiff's allegations "credible" and opined that his
8 impairments "as documented are not inconsistent with symptoms and
9 functional limitations as alleged" but nevertheless did not
10 "preclude RFC as written." (AR 82.)

11 On April 11, 2014, SSA medical consultant Dr. George Walker,
12 a general practitioner,³⁰ conducted an RFC assessment based on
13 Plaintiff's allegations of "worsening of his shoulder and neck
14 pain along with a new impairment of not being able to sleep
15 because of the pain." (AR 90, 94.) Dr. Walker found the
16 allegations "not credible" because they were "not supported by
17 new functional or objective" medical reports. (AR 91.) He
18 upheld Dr. Naiman's RFC assessment and the finding of "not
19 disabled." (AR 92-96.)

20 3. Analysis

21 The ALJ gave "great weight" to the opinions of nonexamining
22 physicians Naiman and Walker and "significant weight" to that of
23 consulting examiner Bernabe. (AR 18.) She afforded "less
24 weight" and "little weight" to treating physician Tomkins's May
25

26 ³⁰ Dr. Walker's electronic signature includes a medical-
27 specialty code of 12, indicating "Family or General Practice."
28 (See AR 94); Program Operations Manual System (POMS) DI
24501.004, U.S. Soc. Sec. Admin. (May 15, 2015), [https://
secure.ssa.gov/apps10/poms.nsf/lnx/0424501004](https://secure.ssa.gov/apps10/poms.nsf/lnx/0424501004).

1 29, 2015 assessment. (AR 18-19.) The ALJ did not discuss Dr.
2 Ahmed or any of his treatment notes, examination results, or
3 opinions on Plaintiff's condition and limitations. (AR 12-21.)

4 Dr. Ahmed had a five-year treatment relationship with
5 Plaintiff in connection with his workers'-compensation claim that
6 included at least three visits in the seven months after
7 Plaintiff's application date. (See AR 260-307, 308-22, 355-59,
8 393-488.) After his initial visit with Plaintiff, in January
9 2009, the doctor opined that he could lift no more than 10 to 15
10 pounds with his right arm and could not do forceful pulling,
11 squeezing, or overhead lifting on his right side. (AR 302-03.)
12 He apparently never revised that assessment.³¹ (See AR 260-307,
13 308-22, 355-59, 393-488.) The ALJ therefore erred in failing to
14 provide a specific and legitimate reason for rejecting his
15 opinion (or, for that matter, any reason at all). See Smolen, 80
16 F.3d at 1285; (cf. AR 12-21). For the reasons stated below, the
17 error was not harmless.

18 Defendant argues that Dr. Ahmed's opinion was properly
19 rejected because he gave it more than four years before the
20 application date and "indicated that [Plaintiff's] limitations
21

22 ³¹ On February 12, 2010, Dr. Ahmed reported that Plaintiff
23 would "soon be reaching maximum medical improvement" and would
24 "return [to work] in the next seven weeks." (AR 484.) But on
25 what appears to have been Plaintiff's next visit, on March 26,
26 2010, Dr. Ahmed noted a positive Spurling test on Plaintiff's
27 cervical spine and impaired mobility in his right shoulder. (AR
28 479.) He did not release him to return to work but instead
administered two cortisone injections, recommended another MRI
and an EMG of his right shoulder, and indicated that he would
reevaluate him in six to seven weeks. (AR 479-80.) He continued
to treat Plaintiff for nearly another four years and did not
clear him to return to work or indicate that he could do some
work with less-restrictive limitations.

1 were only temporary pending treatment, which [he] subsequently
2 had." (See J. Stip. at 17-18.) Ordinarily Defendant would be
3 correct. See Fair v. Bowen, 885 F.2d 597, 600 (9th Cir. 1989)
4 (doctor's opinion predating period at issue not relevant absent
5 allegation that condition had since worsened). But as noted
6 above, Dr. Ahmed apparently did not revise his assessment after
7 Plaintiff's two surgeries and several years of physiotherapy and
8 pain medication, and his notes from Plaintiff's visits after the
9 application date provide no reason to think that Plaintiff's
10 condition had improved enough to warrant less-restrictive
11 limitations. (See AR 355-59 (progress report from Oct. 9, 2013,
12 noting continued neck pain and diagnosing bilateral carpal-tunnel
13 syndrome, disc lesion of cervical spine, and right-elbow and
14 shoulder problems), 393-402 (progress reports from June 28, 2013,
15 and January 10, 2014, noting chronic pain and continued problems
16 with wrists, right shoulder and elbow, and cervical spine).)
17 Nor, evidently, did he ever release Plaintiff to return to work.
18 (See generally AR 260-322, 355-59, 393-488.) And the ALJ never
19 considered or discussed Dr. Ahmed's opinion issued after the
20 application date that Plaintiff had permanent seven-percent WPI
21 and would require "lifetime medical treatment." (See AR 394-95);
22 Meza v. Colvin, No. CV 15-7291-SP, 2016 WL 7479321, at *4-7 (C.D.
23 Cal. Dec. 29, 2016) (ALJ erred in failing to provide any reason
24 for rejecting treating psychiatrist's opinion that plaintiff had
25 mental-health limitations that caused nine- to 12-percent WPI).

26 Defendant's argument that Dr. Bernabe's opinion is "more
27 probative of Plaintiff's condition during the relevant time
28 period" because Dr. Bernabe examined Plaintiff in October 2013

1 ignores Plaintiff's three visits with Dr. Ahmed in the seven
2 months after he applied for SSI benefits, two of which were
3 before Dr. Bernabe's exam and one of which was after.
4 Defendant's analogous argument about the opinions of nonexamining
5 physicians Walker and Naiman fails for the same reason.³²

6 Defendant also argues that Dr. Ahmed's opinion could
7 reasonably have been rejected because he "was a worker's
8 compensation doctor and thus was looking at whether Plaintiff
9 could return to his past work." (See J. Stip. at 17 (citing AR
10 293-305).) Although a "treating physician's opinion" is not
11 necessarily conclusive as to "the ultimate issue of disability,"
12 see Magallanes, 881 F.2d at 751, it is well settled that an ALJ
13 must properly consider every medical opinion without regard to
14 its source or purpose. See Macri v. Chater, 93 F.3d 540, 543-44
15 (9th Cir. 1996) (ALJ entitled to draw inferences logically
16 flowing from evidence adduced in connection with workers'-
17 compensation proceeding although state disability determination
18 not conclusive); Booth v. Barnhart, 181 F. Supp. 2d 1099, 1105
19 (C.D. Cal. 2002) ("[T]he ALJ may not disregard a physician's

20
21 ³² Defendant further claims that the opinions of Drs.
22 Walker and Naiman are "more probative" because those doctors
23 "reviewed the medical record, including several reports which
24 came after Dr. Ahmed's opinion." (J. Stip. at 18.) But several
25 of those subsequent reports were from Dr. Ahmed himself (see AR
26 74-77 (Naiman noting review of two sets of medical records
27 received from Dr. Ahmed in 2013 and specifically mentioning Dr.
28 Ahmed's Nov. 2012 progress notes), 87-90 (Walker noting review of
three sets of records received from Dr. Ahmed between Aug. 2013
and Feb. 2014 and specifically referring to Dr. Ahmed's Feb. 2013
progress notes), 308-22, 355-59, 393-488 (sets of medical records
from Dr. Ahmed submitted to SSA and dating from 2010 to 2014)),
and, as stated above, further developments in Plaintiff's
condition do not appear to have led him to revise his initial
assessment (see AR 260-307, 308-22, 355-59, 393-488).

1 opinion simply because it was initially elicited in a state
2 workers' compensation proceeding."); § 416.927(c) ("Regardless of
3 its source, we will evaluate every medical opinion we receive.").

4 Here, the ALJ explicitly credited the opinion of Dr. Wood –
5 the agreed medical examiner in Plaintiff's worker's-compensation
6 case whose latest examination of Plaintiff occurred three months
7 before the application date – and used it in determining his RFC.
8 (AR 17-18.) Further, she cited Dr. Ahmed's treatment notes from
9 Plaintiff's November 7, 2012 visit as objective evidence of his
10 carpal-tunnel syndrome. (AR 17 (citing AR 314-15, 319).)³³ She
11 also expressly rejected the February 3, 2015 County disability
12 determination (AR 493) as "an opinion on an issue reserved to the
13 Commissioner" that had "no probative value," "was not supported
14 by objective evidence," and was "inconsistent with the record as
15 a whole, including [Plaintiff's] activities of daily living" (AR
16 19), but did she not make any similar statement about Dr. Ahmed's
17 opinion or progress notes. Thus, there is no basis to infer that
18 Dr. Ahmed's status as a worker's-compensation doctor was the
19 reason the ALJ not only implicitly rejected his assessment but
20 failed to acknowledge its existence at all. (See AR 12-20.)

21 Accordingly, on the record before the Court, it is not clear
22 that the ALJ gave proper consideration to the opinion of Dr.
23 Ahmed, Plaintiff's longest-standing treating physician. Had the
24 ALJ properly considered that opinion, she might have determined
25 Plaintiff's RFC – and thus his disability status – differently.

26
27 ³³ The ALJ's citation to AR 319 appears to have been
28 erroneous. That page is part of Dr. Ahmed's progress notes from
a July 25, 2012 visit that is not mentioned or discussed in the
ALJ's decision. (Compare AR 17 with AR 319.)

1 Her failure to provide any explanation at all, much less a
2 specific and legitimate one, for rejecting Dr. Ahmed's assessment
3 was therefore not harmless. See Garrison, 759 F.3d at 1012-13;
4 see also Allen v. Comm'r Soc. Sec. Admin., No. 2:16-cv-00304-SAB,
5 2017 WL 5140877, at *6-7 (E.D. Wash. Sept. 19, 2017) (ALJ
6 committed reversible error in discounting opinion of Plaintiff's
7 treating physician in favor of consulting examiner's opinion in
8 case alleging carpal-tunnel syndrome and degenerative spinal
9 disease).

10 Because the Court reverses on this ground, it declines to
11 address Plaintiff's contentions as to the weight afforded Dr.
12 Tomkins's opinion; the ALJ will necessarily have to reevaluate it
13 in light of her assessment of Dr. Ahmed's opinion and treatment
14 notes. Moreover, as the ALJ assessed Plaintiff's credibility in
15 part based on her erroneous evaluation of the "objective medical
16 evidence" (see AR 17), any reevaluation of the latter will
17 necessarily entail a reassessment of Plaintiff's subjective
18 symptom testimony. Thus, the Court need not reach the issue of
19 Plaintiff's credibility, either. See Hiler v. Astrue, 687 F.3d
20 1208, 1212 (9th Cir. 2012) ("Because we remand the case to the
21 ALJ for the reasons stated, we decline to reach [plaintiff's]
22 alternative ground for remand.").

23 B. Remand for Further Proceedings Is Appropriate

24 When an ALJ errs, as here, the Court "ordinarily must remand
25 for further proceedings." Leon v. Berryhill, 880 F.3d 1041,
26 1044-45 (9th Cir. 2017) (as amended Jan. 25, 2018); see also
27 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000) (as
28 amended); Connett v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003).

1 The Court has discretion to do so or to directly award benefits
2 under the "credit-as-true" rule. Leon, 880 F.3d at 1045. "[A]
3 direct award of benefits was intended as a rare and prophylactic
4 exception to the ordinary remand rule[.]" Id. The "decision of
5 whether to remand for further proceedings turns upon the likely
6 utility of such proceedings," Harman, 211 F.3d at 1179, and
7 "[w]here . . . an ALJ makes a legal error, but the record is
8 uncertain and ambiguous, the proper approach is to remand the
9 case to the agency," Leon, 880 F.3d at 1045 (second alteration in
10 original) (citing Treichler v. Comm'r of Soc. Sec. Admin., 775
11 F.3d 1090, 1105 (9th Cir. 2014)).

12 Here, further administrative proceedings would serve the
13 useful purpose of allowing the ALJ to give proper consideration
14 to all of the medical evidence in the record. See Pino v.
15 Colvin, No. CV 14-5524-E, 2015 WL 12661949, at *5 (C.D. Cal. Mar.
16 24, 2015) (remand appropriate when parties disputed extent and
17 implications of plaintiff's degenerative disc condition and it
18 was "not clear that the ALJ would be required to find Plaintiff
19 disabled" for entire claimed period "if the rejected medical
20 opinions were fully credited"). If the ALJ chooses to discount
21 evidence from Plaintiff's treating physicians in favor of
22 opinions from consulting physicians or to discount Plaintiff's
23 subjective symptoms, she can then provide an adequate discussion
24 of the evidence justifying her doing so. See Payan v. Colvin,
25 672 F. App'x 732, 733 (9th Cir. 2016). Therefore, remand for
26 further proceedings is appropriate. See Garrison, 759 F.3d at
27 1020 & n.26.

1 **VI. CONCLUSION**

2 Consistent with the foregoing and under sentence four of 42
3 U.S.C. § 405(g),³⁴ IT IS ORDERED that judgment be entered
4 REVERSING the Commissioner's decision, GRANTING Plaintiff's
5 request for remand, and REMANDING this action for further
6 proceedings consistent with this memorandum decision.

7
8 DATED: September 27, 2018



9 JEAN ROSENBLUTH
10 U.S. Magistrate Judge
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26 ³⁴ That sentence provides: "The [district] court shall
27 have power to enter, upon the pleadings and transcript of the
28 decision of the Commissioner of Social Security, with or without
remanding the cause for a rehearing."